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No. 04-266

In the Supreme Court of the United States

MORRIS COMMUNICATIONS COMPANY, LLC,

Petitioner,

v.

PGA TOUR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASSOCIATED PRESS SPORTS EDITORS; BELO CORP.; COX ENTERPRISES, INC.; FLORIDA PRESS ASSOCIATION; FLORIDA SOCIETY OF NEWSPAPER EDITORS; GEORGIA PRESS ASSOCIATION; KNIGHT-RIDDER, INC.; MEDIA GENERAL, INC.; MEDIANEWS GROUP INC.; NATIONAL PRESS CLUB; NEWSPAPER ASSOCIATION OF AMERICA; ONLINE NEWS ASSOCIATION; ONLINE PUBLISHERS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; THE E.W. SCRIPPS COMPANY; THE NEW YORK TIMES COMPANY; AND THE WASHINGTON POST COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership in The Washington Post Company.

Private Capital Management beneficially owns more than 10% of the common stock of Belo Corp.

None of the remaining *amici* have a parent corporation, and no publicly held company owns 10% or more of the stock of any of the remaining *amici*.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The *amici curiae* respectfully request leave to file the attached brief pursuant to Court Rule 37.2. Petitioner has consented to the filing of this brief in a letter filed with the Clerk. Respondent has withheld consent.

The *amici curiae* consist of a broad array of news organizations and trade associations that represent newspapers, journalists and online publishers throughout the country. (The *amici* are more fully described in the Statement of Interest below.) *Amici* have filed this brief because of their shared belief that the Eleventh Circuit decision poses a serious threat to the freedom of the press and to the efficient distribution of information on the Internet.

The question presented in this case is whether a newsmaker may privatize non-copyrightable facts that are already in the public domain. This case may arise in the context of the sports industry, but the Eleventh Circuit's decision is not so limited. By its terms, the court's decision would allow any newsmaker to condition access in an effort to limit or manipulate the reporting of political, financial, and other events of public importance. This case is also of fundamental importance insofar as it directly implicates the ownership, and control, of information on the Internet. Because the Eleventh Circuit's resolution of this case would have a severe impact upon the operations of news publishers, the *amici* have a substantial interest in ensuring that this Court, in reviewing the petition for certiorari, fully appreciates the issues at stake.

This Court's copyright decisions make clear that the First Amendment prohibits the ownership of information. *See, e.g.*, *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). Copyright may guarantee the creator's right to the particular mode of expression, but it does not grant the creator ownership over the underlying ideas, or facts, that are

described. Those are part of the public domain and may be reported without restriction. The court of appeals' decision upsets the constitutional balance between copyright and the First Amendment, and in so doing, threatens to undermine the efficient dissemination of information, both on the Internet and elsewhere.

Because the court of appeals' decision is contrary to the freedom of information that lies at the heart of a free press, and because the decision would impose a significant threat to *amici*'s ability to report events of public importance in real time, *amici* seek leave to file this brief as amicus curiae.

Respectfully submitted,

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1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.10[B][2] (2004) 8, 9

1 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 3.04 (1990) 8

Banner, Stuart, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. Legal Stud. 113 (1998) 16

Brandi Barnes Kellis, *A New Technology Question of Olympic Proportions*, 8 J. Intell. Prop. L. 245 (2001) ... 15

Breyer, Stephen, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*,
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Geisst, Charles R., *Wall Street: A History* (1997) 16

Lessig, Lawrence, *The Future of Ideas: The Fate of the Commons in a Connected World* (2001)18

Levitt, Arthur, *The National Market System: A Vision that Endures*,
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Sobel, Robert,
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INTEREST OF AMICI CURIAE

The interest of the *amici curiae* is described in the foregoing Motion for Leave to File.[1] The *amici curiae* consist of eighteen news organizations and news-industry associations, who operate throughout the country. *Amici* have filed this brief because of their shared belief that the Eleventh Circuit decision poses a serious threat to the freedom of the press and to the efficient distribution of information on the Internet.

The American Society of Newspaper Editors ("the Society") is a professional organization of approximately 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

Associated Press Sports Editors is a group of sports editors for more than 400 newspapers throughout the United States and Canada.

Belo Corp. is one of the nation's largest media companies with a diversified group of market-leading television, newspaper, cable and interactive media assets. Belo operates news and information franchises in Texas, the Northwest, the Southwest, Rhode Island and the Mid-Atlantic region. Belo owns 19 television stations; owns or operates seven cable news channels; and manages one television station through a local marketing agreement. Belo's daily newspapers include The Dallas Morning News, The Providence Journal, The Press-Enterprise (Riverside, CA) and the Denton Record-Chronicle (Denton, TX). Belo Interactive's new media businesses include more than 30 websites, several interactive alliances and a broad range of Internet-based products.

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[1] Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amici curiae* states that they alone authored this brief, and no other persons or entities made any monetary contribution to its preparation or submission.

Cox Enterprises, Inc. publishes the Atlanta-Journal Constitution and, through subsidiaries, owns 17 daily and 25 non-daily newspapers, 15 television stations, 78 radio stations and cable television systems reaching over 6 million subscribers.

Florida Press Association is an organization that represents the interests of 45 daily newspapers and 154 weekly newspapers of general circulation throughout the state of Florida.

Florida Society of Newspaper Editors is an association dedicated to advancing the cause of responsible journalism by promoting and protecting freedom of information and public access in Florida; by advocating news coverage that serves the public interest and reflects the diversity of Florida's various communities; by encouraging adherence to the highest journalistic standards; and, by recognizing outstanding journalistic achievement in Florida.

Georgia Press Association is an organization that represents the interests of 33 daily newspapers and 118 weekly newspapers of general circulation in the state of Georgia.

Knight-Ridder, Inc. is the nation's second-largest newspaper publisher, with products in print and online. The company publishes 31 daily newspapers in 28 U.S. markets, with a readership of 8.7 million daily and 12.6 million Sunday. The company's Internet operation, Knight Ridder Digital, develops and manages the company's online properties. It is the founder and operator of Real Cities (www.RealCities.com), the largest national network of city and regional websites in more than 100 U.S. markets. Knight Ridder and Knight Ridder Digital are headquartered in San Jose, California.

Media General, Inc. ("MGI") is a communication company situated primarily in the Southeast, with interests in newspapers, television stations, interactive media and diversified information services. MGI's publishing assets include 25 daily newspapers, interests in approximately 100

other periodicals, 26 network-affiliated television stations, and more than 50 on-line enterprises.

MediaNews Group Inc. ("MNG") is the corporate parent of several companies that publish and distribute newspapers. MNG is the seventh largest newspaper publisher in America and has 40 market dominant daily, and approximately 65 non-daily newspapers in eight states.

The National Press Club, established in 1908, is an organization of journalists and communicators in Washington, D.C., and around the world. It advocates on behalf of First Amendment, press freedom and press access issues, and works to advance the professional standards of journalists.

The Newspaper Association of America is a non-profit organization that represents the interest of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States. NAA has no direct interest in the outcome of this litigation. One of NAA's key priorities, however, is to protect the First Amendment rights of newspapers, including their ability to gather facts and report newsworthy events.

The Online News Association ("ONA") is the premier organization of people who make their livings gathering or producing news for digital presentation. ONA's professional members include news writers, producers, designers, editors, photographers, and others who produce news for distribution over the Internet and through other digital media.

Online Publishers Association is an industry trade organization dedicated to representing high-quality online content providers before the advertising community, the press, the government and the public.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom

of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since1970.

The E.W. Scripps Company is a diverse media company with interests in newspaper publishing, Internet publishing, broadcast television and national television networks. The company's 21 daily newspapers have a combined paid daily circulation of 1.1 million. E. W. Scripps also operates 15 broadcast television stations, four cable and satellite television programming networks, a television retailing network and a variety of websites.

The New York Times Company is the owner of The New York Times, The Boston Globe, The International Herald Tribune, 16 other newspapers, eight network-affiliated television stations, two New York City radio stations and more than 40 websites.

The Washington Post Company is a diversified media and education organization whose principal operations include newspaper and magazine publishing, television broadcasting, cable television systems, electronic information services, test preparation and educational and career services. The company owns The Washington Post, The Herald (Everett, Washington), The Gazette Newspapers, Newsweek, Newsweek International, television stations in Houston, San Antonio, Detroit, Miami, Jacksonville and Orlando, washingtonpost.com, newsweek.com and cable systems serving subscribers in 19 midwestern, western and southern states.

SUMMARY OF ARGUMENT

The question presented in this case is whether a newsmaker may privatize non-copyrightable facts that are already in the public domain. This case arises in the context of the sports industry, where the avid interest of fans in real-time reporting gives the facts in question a substantial economic value. The

Eleventh Circuit's rationale is not so limited, however, and by its terms, it would allow any newsmaker to control access to information and so shape the reporting of political, financial, and other events of public importance. The notion that the organizer of a political convention, for example, could condition media access upon the press's agreement not to report certain events, or to subject their stories to advance clearance, is a notion that is deeply antithetical to our nation's firm commitment to a free press and a vigorous public debate. Yet this is the import of the Eleventh Circuit's decision.

This case is also of fundamental importance insofar as it directly implicates the ownership of information on the Internet. The advent of the Internet has proven to be a tremendous boon to the efficient and quick distribution of information. The Internet has made it possible for every individual to become a news publisher, as the proliferation of online journals and weblogs has demonstrated. The Internet also has allowed established news organizations to expand the content of their publications and to present their reporting in "real-time," rather than waiting for the early morning run of the printing press.

The promise of the Internet, however, depends in part upon the fact that information lies in the public domain. Authors may have a legitimate copyright interest in their mode of expression, but the "free communication of facts" is guaranteed by the First Amendment. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985). The court of appeals' decision threatens this constitutionally required balance by granting the PGA Tour a "property interest" in the golf scores produced during their tournaments. Pet. App. 13a n.13. That holding is contrary to the fundamental principle that facts are part of the public domain, because it allows newsmakers to privatize the underlying facts of newsworthy events. Newsmakers have no legitimate interest in controlling the publication of factual information, regardless of whether it is "unfair that much of the fruit of the compiler's labor may be

used by others without compensation." *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991). The court of appeals' decision is contrary to the freedom of information that lies at the heart of a free press; it deepens an existing circuit split; and it would impose a significant threat to *amici*'s ability to report events of public importance in real time and without restriction. *Certiorari* is therefore warranted.

REASONS FOR GRANTING THE WRIT

I. BY ALLOWING A NEWSMAKER TO PRIVATIZE FACTS IN THE PUBLIC DOMAIN, THE COURT OF APPEALS' DECISION UPSETS THE CONSTITUTIONAL BALANCE BETWEEN COPYRIGHT LAW AND THE FIRST AMENDMENT.

Put simply, the decision below permits the PGA to *privatize facts*. The court of appeals held that the "PGA has a right to control its property interest in ... the compiled golf scores ...." Pet. App. 13a n.13. Despite the court of appeals' insistence to the contrary, this case is most certainly not just "a straightforward antitrust case." *Id.* at 7a.

This is a case of profound significance precisely because the court of appeals recognized an ownership interest in what this Court has held cannot be owned. In *Feist Publications v. Rural Telephone Service Company*, 499 U.S. 340 (1991), this Court recognized that factual information must be a part of the public domain. This is not merely a product of the interpretation of the Copyright Act. It is a "constitutional requirement." *Id.* at 346. *Feist* therefore refused to allow a phone company to maintain "'a monopoly in yellow pages advertising'" through its ownership of the underlying directory information. *Id.* at 343 (citation omitted). The court of appeals held, however, that the PGA could legitimately seek to maintain a monopoly in real-time golf-scores. This decision contravenes *Feist*, and in so doing, it permits the privatization of information in a manner that is deeply troubling to the freedom of the press.

A. This Court Has Recognized That The Constitution Strikes A Balance Between The First Amendment And The Copyright Clause.

It is well-established in the jurisprudence of this Court that the Copyright Clause and the First Amendment freedom of speech do not concern entirely separate spheres. The Copyright Clause, as enforced by Congress, grants authors the rights to control their own artistic expressions in a way that can, and at times must, infringe upon the speech of others. The copyright owner literally can silence others by prohibiting them from making use of a copyright-protected expression without the owner's consent. If extended beyond its proper bounds, copyright would threaten the freedom of speech.

This Court therefore has repeatedly recognized that there is a delicate, and constitutionally necessary balance, between the rights copyright grants creators and the speech rights of others. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("copyright law contains built-in First Amendment accommodations"). That balance is the dichotomy between information and expression. *See Harper & Row,* 471 U.S. at 556 (emphasizing that copyright's dichotomy between unprotected facts and ideas, on the one hand, and protected expression, on the other, "'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'") (citation omitted).[2] Copyright doctrine

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[2] *See also Goldstein v. California*, 412 U.S. 546, 571 (1973) (approving the delicate balance struck between the First Amendment and copyright law where "[n]o restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording"); *Zacchini v. Scripps-Howard Broad.Co.*, 433 U.S. 562, 577 n.13 (1977) (the balance between the First Amendment and copyright law requires that "[n]o restraint can be placed on the use of an idea or concept") (internal quotation marks omitted); 1 Melville

"assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." *Feist*, 499 U.S. at 349-50.

This Court affirmed this distinction in *Feist*, when it held without dissent, that a telephone company could not prohibit others from copying the factual information contained in its telephone directory. 499 U.S. at 343. The Court rejected the argument that the telephone company's hard work in compiling the telephone listings precluded a publishing company from copying the raw data contained in the listings. Even though the telephone company "may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, ... this data [did] not 'owe its origin' to" the telephone company. *See id.* at 361 (citation omitted). The raw facts were a part of the public domain, just as "'information respecting current events ... is a report of matters that ordinarily are *publici juris*.'" *Id.* at 353-54 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918)).

The Court thus rejected a "sweat of the brow" rule that would give ownership of facts to those who compile them. Such a rule would turn the fact/expression dichotomy on its head, *see id.* at 350, and it would "create[] a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors,'" as required by the Constitution. *Id.* at 354 (quoting 1 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 3.04, p.3-23 (1990)).

Copyright law protects the originality of expression. It does not allow a party to claim that time and money spent gathering facts in the public domain justifies private control over those facts. *See Feist*, 499 U.S. at 350; 1 Melville B. Nimmer &

B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.10[B][2], p. 1-141 (2004) ("a definitional balance between the First Amendment and Copyright must assure the unfettered communication of ideas and facts.").

David Nimmer, *Nimmer on Copyright* § 1.10[B][2] n.45.2 (2004) ("copyright law never restricts access to *information*, as opposed to the expression of that information," because that would be a "serious encroachment on First Amendment values") (original emphasis). This is fundamental, because the fact/expression dichotomy is the means by which copyright and free speech rights strike a balance.

B. The Court Of Appeals' Decision Expressly Authorizes A Newsmaker To Monopolize Public Facts.

The court of appeals' decision casts aside the fact/expression dichotomy by holding, contrary to *Feist*, that facts—here golf scores—are not part of that public domain. The court of appeals concluded that the PGA has the "right to control" the "compiled golf scores" and therefore cannot be held liable in antitrust for its efforts to preserve its monopoly over those facts. Pet. App. 13a n.13. According to the court of appeals, *Feist* had no relevance here because Morris Communications had filed an *antitrust* suit. *See id.* at 6a-7a.

This defies logic. The First Amendment principle underlying *Feist* does not depend upon the nature of the lawsuit. The bottom line remains the same: The PGA has no right to control the distribution of facts. Yet, this is precisely what the Eleventh Circuit held the PGA had a "valid interest" in doing. The Eleventh Circuit's decision is in direct conflict with this Court's holding that the "sweat of the brow" does not justify the privatization of facts, and it deepens a circuit split over whether a party can privatize facts by imposing contractual restrictions on dissemination. *Compare id.*; *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), *cert. denied*, 539 U.S. 928 (2003), *with Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940) (L. Hand, J.).

The PGA prohibits media organizations covering its golf tournaments from compiling and publishing real-time golf scores. It does so by giving press credentials only to those news organizations that accede to the ban, and by allowing only PGA volunteers to use walkie-talkies, handheld communication devices or cell phones on the golf course. Pet. App. 2a-4a. Those volunteers man each hole on the golf course and relay the scores to "leaderboards" and to the media center. *Id.* at 2a. Because of the PGA's "walkie-talkie ban," Morris Communications could not gather the scores on its own; so it instead relied upon the scores PGA volunteers sent to the media center. Morris employees verified the accuracy of the displayed scores and then published the verified scores on its website and to commercial partners. Pet. 4. At first, the PGA had no objection as Morris published real-time golf scores on its Internet website. Pet. App. 3a n.1. Presumably the PGA recognized that the Internet was a powerful tool that Morris was using to bring news of the game immediately to golf fans across the nation.

But the PGA apparently determined that it could generate more profits by exercising exclusive control over when and to whom the golf scores were disseminated. The PGA thus imposed new restrictions prohibiting Morris Communications from publishing the golf scores in real time. Morris was told it had to wait until the PGA published the scores on its own website (which it apparently did not always do in real time) or until a half hour had elapsed. *Id.* at 3a-4a & n.1. The PGA thus asserted ownership over factual information that belonged in the public domain.

The court of appeals held that the PGA could not be held liable for maintaining a monopoly over these golf scores, because the PGA could legitimately require that Morris "purchase" the golf scores in order to prevent Morris from *free riding* on the PGA's "investment" in compiling the scores. *See*

Pet. App. 12a-13a.[3] The court of appeals' decision allows the PGA to control indisputably factual information based solely on the PGA's so-called "valid" interest in preventing Morris from free-riding on the fruits of the PGA's labors.

That conclusion was essential to its resolution of the antitrust claims at issue in this case, but it is directly contrary to *Feist*'s holding that the sweat of the compiler's brow cannot justify the removal of facts from the public domain. *See Feist*, 499 U.S. at 350; *see also WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 45 (1st Cir. 1991) (Breyer, J.) ("[T]he man who clears a swamp, the developer of a neighborhood, the academic scientist, the school teacher, and millions of others, each day create 'value' (over and above what they are paid) that the law permits others to receive without charge.").

The Eleventh Circuit purported to limit its decision by holding that *Feist* only prohibited a "sweat of the brow" defense in copyright cases but the question here arose in an antitrust case. But this Court's constitutionally required holding hardly applies only to a discrete set of "copyright" cases. Rather, this

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[3] Even if the PGA could ban the dissemination of public facts (which it cannot), it is difficult to understand how Morris Communications was free riding. Until the PGA imposed its ban, Morris was the leading innovator in Internet news coverage of real-time golf scores. Morris sought to disseminate golf scores as widely and quickly as possible, necessarily relying on the PGA's scores because the PGA refused to allow Morris to gather the scores on its own. Nor did the PGA incur any additional cost in compiling golf scores for Internet publication. The PGA compiled scores for spectators and players at its tournaments long before it publishes them on the Internet. Thus, the court of appeals' "free-riding" holding effectively allows a newsmaker to limit the news media's ability to gather the news (here, under the PGA's walkie-talkie ban) and then claim that the media's failure to gather the news (because of the walkie-talkie ban) justifies more onerous restrictions on their right to disseminate the news (the ban on publishing real-time golf scores on the Internet).

Court has recognized that the First Amendment principle at stake is an *issue* that can arise in a variety of different contexts.

Take, for example, the many ways in which this Court has applied the First Amendment freedom of speech. The First Amendment is the reason why a school board cannot point to a teacher's political views as the reason for his termination, *see Pickering v. Board of Ed. of Tp. High Sch. Dist. 205*, 391 U.S. 563 (1968), why a city police commissioner's libel action must fail, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and even why liability may not be imposed for a group boycott under the antitrust laws, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Just as the *Pickering* school board's defense was not valid under the First Amendment, the PGA's "business justification defense" was not valid under the well-established *Feist* rule that facts are part of the public domain.

Thus, it makes no difference whether plaintiff's underlying claim is based on the antitrust laws or contract law, *see, e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (contract claim). Indeed, even in *Feist* itself, the telephone company had refused to license its telephone listings because it was trying "'to extend its monopoly in telephone service to a monopoly in yellow pages advertising.'" 499 U.S. at 343 (citation omitted). The only difference from this case is that in *Feist*, the publishing company ignored the telephone directory's refusal to license and published the directory anyway. In contrast, here, Morris did not defy the terms of its press credentials, but instead, sought judicial relief for the PGA's attempt at monopoly. It would be odd, to say the least, if a news organization could not rely upon the *Feist* rule simply because the organization chose to challenge the lawfulness of the reporting ban before violating it. A newsmaker simply cannot avoid *Feist* by imposing onerous contract restrictions on the news media in an effort to maintain control over the facts otherwise in the public domain.

The court of appeals' decision thus deepens a circuit split on the ease with which private parties can circumvent the *Feist* rule. *ProCD* held that private parties can create their own version of copyright law by restricting the dissemination of factual information. 86 F.3d at 1454-55. That court believed that contract law could never protect the same type of right as copyright law, *id.*, even though the contract at issue expressly prohibited dissemination, which is precisely the "type" of right governed by copyright law. *See also Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (private parties may by contract protect ideas not protected under copyright law). The Fifth Circuit, on the other hand, held unenforceable a license agreement that prohibited a software producer from disassembling a computer program, because copyright law expressly authorized the adaptation of programs in certain circumstances. *See Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269-70 (5th Cir. 1988).

The Eleventh Circuit's decision not only deepens the existing circuit split, but it extends it in a troubling direction. For the first time, a court has held not only that publishers can contract around the *Feist* rule, but that a newsmaker can do the same in the context of constraining press coverage. For the reasons explained below, *amici* fear that this decision will have a serious impact upon the freedom of the press in general, and on the future of online news publishing, in particular.

II. IF ALLOWED TO STAND, THE COURT OF APPEALS' DECISION WILL SUBSTANTIALLY BURDEN THE NEWS MEDIA'S FREEDOM TO PUBLISH NEWS OVER THE INTERNET.

Absent this Court's intervention, the court of appeals' decision imposes a significant threat to the news media's freedom to publish the news over the Internet. The Eleventh Circuit purported to limit its holding to the *syndication* of news, *see* Pet. App. 7a ("[T]he only real issue before us is whether the PGA's restrictions and prohibitions regarding Morris's ability to *sell* compiled real-time golf scores to third parties violates § 2 of the Sherman Act.") (emphasis in original), but its decision does not depend upon whether Morris is selling the real-time golf scores or "merely" posting them on Morris's own website. Rather, the court of appeals squarely recognized the PGA's right to restrict *any* publication of real-time golf scores before the PGA itself decides to publish them or a certain amount of time has elapsed (and the scores are thus no longer "real time"). *See* Pet. App. 3a-4a (describing PGA restrictions); *id.* at 13a n.13 (rejecting argument that "the PGA is not allowed to put restrictions on the dissemination of the compiled golf scores once they reach the media center," and holding that the "PGA has a right to control its property interest in ... the compiled golf scores").

The court of appeals' decision thus confers on newsmakers ownership over "their" newsworthy facts and makes public access to those facts contingent upon the newsmakers' willingness to disclose the facts publicly or to license the facts to another publisher. This is antithetical to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

A. The Court Of Appeals' Decision Allows Newsmakers To Control Publication Of The News.

The advent of the Internet has frustrated countless businesses' efforts to "privatize" newsworthy facts – thereby benefiting information-hungry consumers across the United States and the world. Until now, technological advancements (and the laws that govern them) have prevented companies like the PGA from cordoning off their preferred segments of the public domain. But the court of appeals' decision threatens to undermine both technological innovation and our nation's commitment to public access to newsworthy facts.

The PGA is the latest in a long line of companies that seek to "privatize" facts that rightfully belong in the public domain. For example, the Second Circuit recently considered whether the National Basketball Association could stop a technology company from distributing basketball scores in real-time through pagers and over an Internet website on America On-Line. *See Nat'l Basketball Ass'n v. Motorola Inc.*, 105 F.3d 841 (2d Cir. 1997). A similar question almost arose during the 2000 Summer Olympics, where the International Olympic Committee ("IOC") attempted to ban Internet broadcasting of sporting events in order to avoid cannibalizing the television viewership. *See* Brandi Barnes Kellis, *A New Technology Question of Olympic Proportions*, 8 J. Intell. Prop. L. 245 (2001). While the IOC may be entitled to license broadcasting of the Olympic events, the Eleventh Circuit's decision would allow the IOC to go a step further and ban the news media from broadcasting the *results* of sporting events, at least before NBC had a chance to broadcast the events in prime time. Those facts, like the PGA's golf scores, are in the public domain as soon as the athletes finish the race. But the court of appeals' decision takes the scores out of the public domain until the newsmaker decides to put them back in.

The issues presented here go beyond the sports world. Indeed, financial markets have long recognized the importance of controlling information, and financial regulators have likewise taken affirmative efforts to make sure that information is available to all investors. From its inception almost two centuries ago, the New York Stock Exchange ("NYSE") recognized that price information could be valuable if it could be restricted to members and accordingly took steps to limit its dissemination. For example, one month after the stock exchange began operating in March 1817, the members voted to impose fines on "any member leaving the room during the calling of Stocks." This rule remained in effect, preventing members from leaking price information to nonmembers before a session was over and ensuring that each member had an equal opportunity to profit from his knowledge advantage over nonmembers. *See* Charles R. Geisst, *Wall Street: A History* 21 & n.9 (1997)); Stuart Banner, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. Legal Stud. 113, 117 n.9 & 121 (1998) (citing 1820 By-Laws, Art 3; 1833 By-Laws, Art 3; and 1856 By-Laws, Art 47); Walter Werner & Steven T. Smith, *Wall Street* 29, 31 & nn.25-28 (1991). *Cf.* Arthur Levitt, *The National Market System: A Vision that Endures,* Speech, Stanford, Cal., Jan 8, 2001, *available at* http://www.sec.gov/news/speech/spch453.htm (last visited Sept. 14, 2004) ("[In 1975, d]ominant markets held pricing data close to the vest and wielded it like a club in competition with other markets. Connections between markets were primitive or even non-existent, making it virtually impossible to access better prices in other markets – that is, if you knew they were there.").

The stock exchange continued its periodic attempts to "privatize" the facts generated by its members' trading activity until Black Tuesday and the Great Depression ushered in a new era of informational transparency on Wall Street. *See* Robert Sobel, *N.Y.S.E.: A History of the New York Stock Exchange*

1935-1975 30-45 (1975). This new transparency and the free flow of information that accompanied it has since fueled the tremendous growth in the financial markets and paid substantial dividends for consumers: "[Today, f]or less than the price of a good cup of coffee, individual investors have access for a full month to the best current prices in more than 3,000 NYSE listed securities. For about the same price, they get data for more than 4,000 Nasdaq securities." *See* Levitt, *supra.* Indeed, this transparency even contributed to the creation of the Nasdaq exchange: The SEC and the National Association of Securities Dealers (NASD) used NYSE's pricing data to identify inefficiencies in the "over-the-counter" market for securities traded outside the NYSE. They devised an automated quotation system (Nasdaq) that quickly grew into a potent competitor in the securities market. *See* Nasdaq Timeline, *available at* http://www.nasdaq.com/ newsroom/presskit/timeline.stm (last visited Sept. 14, 2004).

The experience of these financial markets demonstrates both the value of real-time information, and the importance of ensuring that such information is readily available to the public. The Eleventh Circuit's holding that the PGA can monopolize the market for its real-time golf scores with immunity is a dangerous precedent that would extend not only to the sports world, but to financial markets, and potentially even political events. As this Court has recognized, "'information respecting current events ... is a report of matters that ordinarily are *publici juris*.'" *Feist*, 499 U.S. at 353-54 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918)). Newsmakers like the PGA have no right to monopolize that information to the public's detriment.

B. The Court Of Appeals' Decision Will Deter Innovation On The Internet.

The court of appeals' decision will harm the public not just by restricting the open dissemination of information, but also by reducing the incentive of innovators like Morris to expand the

Internet's potential for novel and efficient ways of distributing information.

The decision below allows the PGA – and other newsmakers – to claim ownership over newsworthy facts. According to the court below, the PGA "has acted appropriately to protect its economic interests and investments," and Morris presented "the classic example of 'free riding.'" Pet. App. 17a-18a.

Justice Breyer, however, convincingly rebutted this logic more than thirty years ago, when he argued that claims of "free riding" are often efforts to maintain supra-competitive prices and to deaden innovation. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 321, 347 (1970); *see also* Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* 176 (2001) ("Dinosaurs should die. This lesson we have learned over and over again. And innovators should resist efforts by dinosaurs to keep control. Not because dinosaurs are evil; not because they can't change; but because the greatest innovation will come from those outside these old institutions.").

Far from a free rider, Morris Communications was the first media company to publish complete, real-time golf scores on the Internet. Pet. 4. Rather than attempting to compete and innovate on the merits, the PGA opted instead to monopolize the market Morris created by controlling the supply of newsworthy facts.

The PGA has no ownership rights over the facts produced at its events, and therefore it has no right to prevent others from disseminating that information. If the PGA can get away with monopolizing this information, then it will deter future innovators like Morris, from seeking to invest in developing the possibilities that the Internet offers to the efficient distribution of information. As with other monopolies, it is the public who will ultimately suffer from these restrictions on innovation.

CONCLUSION

This Court should grant the petition for writ of *certiorari* and set the case for full briefing and oral argument.

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